(2)

No. 04-1416

IN THE

Supreme Court of the United States

CITY OF CLEVELAND,
Petitioner,

v.

ROBERT M. BECK, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ROBERT E. PAUL *
MICHAEL S. WOLLY
ZWERDLING, PAUL, KAHN & WOLLY, P.C.
1025 Connecticut Avenue N.W.
Suite 712
Washington, D.C. 20036
(202) 857-5000

* Counsel of Record

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the payment of overtime to a Cleveland police officer to cover a work shift of another officer who requests the use of earned compensatory time off constitutes "undu[e] disrupt[ion of] the operation of the public agency" within the meaning of Section 7(o)(5) of the Fair Labor Standards Act, 29 U.S.C. §207(o)(5), and the official regulations and interpretations promulgated by the U. S. Department of Labor.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, generally prohibits employment of more than forty hours in a work week without the payment of time-and-one-half of the employee's regular rate for any additional hours of work. In *Garcia v. San Antonio Metropolitan Transit Authority et al.*, 469 U.S. 528 (1985), the FLSA was made applicable to employees of state and local governments. Thereafter, the statute was amended to ameliorate the effects of *Garcia* by permitting these political entities to compensate employees with compensatory time ("comp time") or leave, rather than overtime pay, provided that the employer has an agreement with the employees to that effect. The 1985 amendments require that

> [a]n employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—

> (A) who has accrued compensatory time off authorized to be provided under paragraph (1), and
>
> (B) who has requested the use of such compensatory time,
>
> shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. § 207(o)(5). The comp time exception to the required payment of overtime wages was intended "to provide flexibility to state and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours." H.R. Rep. No. 331, 99th Cong., 1st Sess. 19 (1985).

2. Congress expressly delegated to the Secretary of the United States Department of Labor the authority to promulgate regulations to implement the 1985 amendments. Pub. L. No. 99-150, § 6, 99 Stat. 790 (note to 29 U.S.C. § 203). The Secretary issued such regulations in 1987, defining the term "unduly disrupt" as follows:

> (d) *Unduly disrupt.* When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (See H. Rep. 99-331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

29 C.F.R. § 553.25. In the explanatory notes to the regulations, the Secretary concluded that the payment of overtime

to an employee who substitutes for an employee using comp time does not constitute "undu[e] disrupt[ion]."

> The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive.

52 Fed. Reg. 2012, 2017 (1987).

3. Consistent with its regulations, the Department of Labor has long held that the payment of overtime compensation to an employee in order to permit another to use earned compensatory time does not "unduly disrupt" operations. A 1994 Opinion Letter, issued by the Wage and Hour Administrator, reiterates the rule.

> It is our position . . . that an agency may not turn down a request from an employee for compensatory time off unless it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services. The fact that overtime may be required of one employee to permit another employee to use compensatory time off would not be a sufficient reason for an employer to claim that the compensatory time off request is unduly disruptive.

1994 WL 1004861 (DOL-WAGE-HOUR) (Aug. 19, 1994).

The Secretary also enunciated this interpretation in an *amicus* brief filed in *Debraska v. City of Milwaukee*, 131 F. Supp. 2d 1032 (E.D. Wisc. 2000). The Secretary urged the court to reject the assertion that the payment of overtime to a replacement constitutes undue disruption. The court agreed, noting that "Congress recognized that only operational disruption, not payroll expense to the employer, could be a basis for denying an employee the use of accrued comp time." *Id.* at 1036. The same result was reached in *Canney v.*

Brookline, 142 Lab. Cas. ¶ 34,169, 2000 WL 1612703 (D. Mass. 2000) and *Long Beach Police Assn. v. Luman*, 8 Wage & Hour Cas. 2nd (BNA) 1395, 2001 WL 1729693 (C.D. Cal. 2001).

4. In 1999, Robert Beck, President of the Cleveland Police Patrolmen's Association, and almost 1400 other past and present patrol officers employed by the City of Cleveland, Ohio, filed a complaint in the district court alleging that the City of Cleveland and the Cleveland Police Department were violating the FLSA in several respects, including the refusal to grant comp time off whenever doing so would result in the payment of overtime to the replacement officer. With respect to this systematic denial of the use of compensatory time,[1] the district judge held the payment of overtime to a replacement officer, in order for a patrol officer to use requested comp time, would constitute undue disruption under the FLSA. The court concluded that the statutory term "undue disruption" was unambiguous and, therefore, refused to defer to the official regulations and interpretations of the Department of Labor, which she found to be "unreasonable."

5. The court of appeals reversed the district court and remanded the case for further proceedings. The court found that "unduly disruptive" in the statute is "inherently ambiguous" and that, under *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), deference to the Secretary of Labor's interpretation of "unduly disrupt [was appropriate], especially where, as here, the regulation and its interpretation have been consistently applied since 1987." Pet., p. 15a. Based on the regulations, the interpretation, the *amicus* brief of the Secretary, and the opinions of the other

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[1] The Cleveland Police Patrolmen's Association and the city have entered into a series of collective bargaining agreements which permit the use of compensatory time off in lieu of overtime wages. Pet., p. 5a-7a.

courts which examined the issue, the court of appeals held that Cleveland's "systemic" refusal to honor a police officer's request to use comp time because it might have to pay a replacement overtime violates the statute.[2] *Id.* at 25a.

> In our view, invalidation of the Police Officers' statutory rights under Section 207(o)(5) requires a clear showing of the City's entitlement to the undue disruption exception to awards of accumulated compensatory leave. The Police Officers' compensatory leave requests must be granted absent "clear and affirmative evidence" [] of an undue disruption of the City's provision of police services for its citizens that is the controlling consideration under the "unduly disrupt" standard in Section 207(o)(5).

Id. at 28a (footnote omitted).

ARGUMENT

I. THERE IS NO CONFLICT AMONGST THE COURTS OF APPEALS TO WARRANT REVIEW

Petitioner contends (Pet. 8) that this Court should grant review to resolve a conflict among the circuits as to whether the payment of overtime compensation to a replacement employee, in order that another may use earned compensatory leave, constitutes "undu[e] disrupt[ion of the] operation of the public agency." 29 U.S.C. § 207(o)(5). There is, in fact, no conflict among the circuits on this question. Petitioner's claim that *Houston Police Officers' Union v. City of Houston*, 330 F.3d 298 (5th Cir. 2003), cert. denied, 540 U.S. 879

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[2] "[T]he record reveals that the controlling factor here is the financial consequences of granting the Police Officers' otherwise timely requests for compensatory leave." Pet., p. 24a. Because the district court had addressed only liability issues, the record does not yet reveal the number of comp time requests that were systematically denied on the basis of Cleveland's "policy [which is] not to allow compensatory time to be used if overtime is required." Pet., p. 6.

(2003), and *Mortensen v. City of Sacramento*, 368 F.3d 1082 (9th Cir. 2004), are at odds with the Sixth Circuit's decision in this case is plainly erroneous.

The question addressed both in *Houston* and *Mortensen* concerned the meaning of the statutory term "reasonable period," which is separately defined in the regulations.[3] Both courts rejected the position that an employer is required to grant the specific day off requested by the employee provided that the employee gives a "reasonable period" of notice of the request, and held that the employer may select a day off for the employee as long as the day falls within a "reasonable period" following the request. *Houston*, 330 F.3d at 303-04; *Mortensen*, 368 F.3d at 1084.[4]

By contrast, the "reasonable period" question decided in both *Houston* and *Mortensen* was not even an issue in the instant case. The district judge found (Pet. App. 62a) that there was no genuine dispute in this case with regard to the "reasonable period" standard, and the court of appeals held

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[3] An employee is entitled to use earned comp time "*within a reasonable period* after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5)(emphasis added).

[4] For the same reason, petitioner's reliance on *Aiken v. City of Memphis*, 190 F.3d 753 (6th Cir. 1999), cert. denied, 528 U.S. 1157 (2000), and *Scott v. City of New York*, 340 F. Supp. 2d 371 (S.D.N.Y. 2004), is equally misplaced. As with *Houston* and *Mortensen*, both cases address the "reasonable period" standard. For this reason, petitioner's repeated consternation about "employee choice" of a day off and "employer flexibility" as to the day off—concepts admittedly at issue in the "reasonable period" cases—has no application to the separate "undu[e] disrupt[ion]" standard upheld by the court of appeals in this case.

The Fifth and Ninth Circuit decisions contain only a passing reference to the term "unduly disrupt" and that is simply because the term is part of the same statutory section as the term "reasonable period." Neither court ruled on whether the payment of overtime to a replacement employee constitutes "undu[e] disrupt[ion]" within the meaning of the Act.

that the clause "is not as [*sic*] issue in this appeal." Pet., p. 25a. Rather, the issue here was "whether, upon the proof presented, the City's denial of its police officers' *timely* requests for use of their accrued compensatory leave, to avoid payment of substitute officers at overtime rates, is appropriate under Section 207(o)(5)'s *undue disruption* rule." Pet., p. 9a-10a (emphasis added).

Thus, Petitioner's rhetoric notwithstanding, there is no conflict in the circuits on the issue decided in this case. As a result, there is no occasion for review by this Court.

II. THE COURT OF APPEALS PROPERLY DEFERRED TO THE REGULATIONS

In *Christensen v. Harris County*, 529 U.S. 576, 587 (2000), this Court held that § 207(o)(5) "imposes a restriction upon an employer's efforts to *prohibit* the use of compensatory time when employees request to do so. . . ." (Emphasis in original.) When Congress enacted this "restriction," it required a public employer to grant an employee's request to use earned comp time "within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. § 207(o)(5). As noted, Congress expressly delegated to the Secretary the authority to issue regulations to define the phrase "unduly disrupt the operations of the public agency." The regulations require that an agency "reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services" to deny an employee's request to use earned comp leave. 29 C.F.R. § 553.25. The Secretary added that the payment of overtime to a replacement employee in order that another may use comp time does not constitute "undu[e] disrupt[ion]." *Supra* at 2.

It is well established that "the framework of deference set forth in *Chevron* does apply to an agency interpretation

contained in a regulation." *Christensen*, at 587. Indeed, an agency's interpretations are entitled to deference "when the language of the regulation is ambiguous," but even without such ambiguity the interpretation is "'entitled to respect.'" *Id.*, at 587-88.

In this case, the regulations and the Secretary's consistent interpretations are firmly rooted in the legislative history of the 1985 amendments. The House Report notes that an employee's request to use comp time "should be honored unless to do so would be unduly disruptive," H.R. Rep. No. 99-331, at 23 (1985), and the Senate Report teaches that governmental operations lie at the epicenter of the "unduly disrupt[ive]" test.[5]

> By "unduly disruptive," the committee means something more than mere inconvenience. For example, a request by a snow plow operator in Maine to use 40 hours of comp time in February probably would be unduly disruptive. This would be true whether the request was made 48 hours or several months in advance. On the other hand, the same request by the same employee for the same number of hours in June would not be unduly disruptive.

Senate Report No. 99-159, 1985 U.S.C.A.N. 651, 660 (1985).

The court of appeals considered the legislative history, regulations and interpretations, including the Secretary's *amicus* position in *Debraska*, to determine whether the payment of overtime, if necessary, to a substituting officer was "unduly disrupt[ive]" within the meaning of the statute.[6]

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[5] "[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill. . . ." *Garcia v. U.S.*, 469 U.S. 70, 76 (1984).

[6] As the court noted in *Debraska*, it is not always necessary to *pay* a substitute—whether in overtime wages or comp time—in order to grant an employee's request to use comp time. If employees are able to switch days off, change shifts, be called in from other divisions, or if the em-

Collectively, these pronouncements have a common refrain: the payment of overtime to a replacement cannot *per se* defeat an employer's obligation to grant an employee's request to use earned compensatory leave. After all, the statutory scheme of the FLSA makes it clear that comp time belongs to the employee, and that an employee is entitled to its timely use unless the employer can clearly demonstrate that the utilization of the leave would "unduly disrupt governmental *operations*." 29 U.S.C. § 207(o)(5)(emphasis added). The Secretary squarely addressed this issue, and the court of appeals properly deferred to that ruling under *Chevron*.

Furthermore, the decision below is in harmony with the uniform view of the other courts that have considered the issue. *Debraska*, *supra*; *Canney*, *supra*; *Long Beach*, *supra*. In each instance, the courts held that the phrase "unduly disrupt" in § 207(o)(5) requires proof of undue disruption of governmental *operations* and services, and that the payment of overtime wages to an employee in order that another may take earned comp leave does not constitute "undu[e] disrupt[ion]" of the agency's operations.

Finally, petitioner's effort to portray the court of appeals decision as establishing an "*ex post facto*" (Pet. 29) requirement to pay overtime is disingenuous. After all, the Labor Department declared, not long after the adoption of the 1985 amendments, that payment of overtime to a replacement employee would not constitute "undu[e] disrupt[ion]" under the FLSA. The statute does not require comp time agreements. A public employer that concludes it would be less costly to pay overtime pay than to credit employees with comp time need not enter into a comp time agreement.

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ployer can simply leave an employee's shift uncovered, there may be fewer situations even to inquire about undue disruption. 131 F. Supp. 2d at 1037.

But Cleveland *did* enter into such an agreement. As a result, the only relevant consideration under the FLSA is whether the City can clearly demonstrate a disruption of operations and services from an employee's use of comp time. This is precisely the question that the court of appeals has remanded to the trial court to examine. Indeed, the posture of this proceeding serves to underscore the impropriety of the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT E. PAUL *
MICHAEL S. WOLLY
ZWERDLING, PAUL, KAHN
& WOLLY, P.C.
1025 Connecticut Avenue N.W.
Suite 712
Washington, D.C. 20036
(202) 857-5000

* Counsel of Record

Attorneys for Respondents

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